HOUSE BILL NO. 424

INTRODUCED BY K. PETERSON, BARRETT, BERRY, BOHLINGER, CHRISTIAENS, GALLUS, HARGROVE, MAHLUM, MCNUTT, NEWMAN, PEASE, SOMERVILLE, TASH, B. THOMAS

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A CAUSE OF ACTION FOR DAMAGES AGAINST A HEALTH CARRIER OR MANAGED CARE ENTITY THAT FAILS TO EXERCISE ORDINARY CARE IN MAKING HEALTH CARE TREATMENT DECISIONS AFFECTING THE INSURED OR ENROLLEE OF THAT CARRIER OR ENTITY; PROVIDING A DEFINITION OF ORDINARY CARE; STATING REQUIREMENTS FOR AN ACTION FOR DAMAGES; AMENDING ~~SECTION~~ SECTIONS 27-6-103 AND 33-37-101, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

SECTION 1. SECTION 27-6-103, MCA, IS AMENDED TO READ:

"27-6-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Dentist" means:

(a) for purposes of the assessment of the annual surcharge, an individual licensed to practice dentistry under the provisions of Title 37, chapter 4, who at the time of the assessment:

(i) has as the individual's principal residence or place of dental practice the state of Montana;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of dentistry; or

(b) for all other purposes, a person licensed to practice dentistry under the provisions of Title 37, chapter 4, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of dental practice the state of Montana and was not employed full-time by any federal governmental agency or entity; or

(ii) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render dental services and whose shareholders, partners, or owners were individual dentists licensed to practice dentistry under the provisions of Title 37, chapter 4.

(2) (a) "Health care facility" means a facility (other than a governmental infirmary but including

a university or college infirmary) licensed as a health care facility under Title 50, chapter 5.

(b) For the purposes of this chapter, a health care facility does not include a chemical dependency facility, an end-stage renal dialysis facility, a home infusion therapy agency, or a residential care facility.

(3) "Health care provider" means:

(a) a physician, a dentist, a podiatrist, or a health care facility; or

(b) for purposes of a claim under [section 3], a health carrier or managed care entity as defined in 33-37-101.

(4) "Hospital" means a hospital as defined in 50-5-101.

(5) "Malpractice claim" means a claim under [section 3] or a claim or potential claim of a claimant against a health care provider for medical or dental treatment, lack of medical or dental treatment, or other alleged departure from accepted standards of health care that proximately results in damage to the claimant, whether the claimant's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(6) "Panel" means the Montana medical legal panel provided for in 27-6-104.

(7) "Physician" means:

(a) for purposes of the assessment of the annual surcharge, an individual licensed to practice medicine under the provisions of Title 37, chapter 3, who at the time of the assessment:

(i) has as the individual's principal residence or place of medical practice the state of Montana;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of medicine; or

(b) for all other purposes, a person licensed to practice medicine under the provisions of Title 37, chapter 3, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of medical practice the state of Montana and was not employed full-time by any federal governmental agency or entity; or

(ii) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render medical services and whose shareholders, partners, or owners were individual physicians licensed to practice medicine under the provisions of Title 37, chapter 3.

(8) "Podiatrist" means:

(a) for purposes of the assessment of the annual surcharge, an individual licensed to practice podiatry under the provisions of Title 37, chapter 6, who at the time of the assessment:

(i) has as the individual's principal residence or place of podiatric practice the state of Montana;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of podiatry; or

(b) for all other purposes, a person licensed to practice podiatry under the provisions of Title 37, chapter 6, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of podiatric practice the state of Montana and was not employed full-time by any federal governmental agency or entity; or

(ii) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render podiatric services and whose shareholders, partners, or owners were individual podiatrists licensed to practice podiatry under the provisions of Title 37, chapter 6."

Section 2. Section 33-37-101, MCA, is amended to read:

"33-37-101. Definitions. For the purposes of this chapter, the following definitions apply:

(1) "Adverse determination" means a determination by a health carrier, a managed care entity, or an agent of a health carrier or managed care entity that the health care services furnished or proposed to be furnished to an enrollee are not appropriate and medically necessary.

(2) "Appropriate and medically necessary" means the standard for health care services as determined by health care providers in accordance with the prevailing practices and standards of the health care profession and community.

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "Enrollee" has the meaning provided for a covered person as defined in 33-36-103.

(5) "Health benefit plan" has the meaning provided in 33-36-103.

(6) "Health care provider" has the meaning provided in 33-36-103.

(7) (a) "Health care treatment decision" means a determination made when medical services are actually provided by a health carrier or ~~other~~ managed care entity and that affects the quality of the diagnosis, care, or treatment provided to the insureds or enrollees of a health benefit plan.

(b) The term does not include a decision by a health carrier or managed care entity to deny payment or coverage for services based on the provisions of a policy, contract, certificate, or agreement.

(8) "Health carrier" has the meaning provided for in 33-36-103.

(9) (a) "Managed care entity" means a health carrier or any entity that delivers, administers, or assumes risk for health care services with systems or techniques to control or influence the quality, accessibility, utilization, or costs and prices of health care services to a defined enrollee population.

(b) The term does not include an employer purchasing coverage or acting on behalf of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer.

(10) "Ordinary care" means:

(a) in the case of a health carrier or managed care entity, the degree of care that an ordinarily prudent health carrier or managed care entity would exercise under the same or similar circumstances;

(b) in the case of a person who is an employee, representative, or agent of a health carrier or managed care entity, the degree of care that an ordinarily prudent person in the same profession, specialty, or area of practice would exercise under the same or similar circumstances.

~~(10)~~(11) "Peer" means a health care provider actively practicing a health care profession in this state who has substantially the same education and training, who provides substantially the same range of health care services, and who has the same license or certification to practice as the health care provider whose practice, professional services, or activities on behalf of the enrollee are being considered, reviewed, evaluated, or judged."

NEW SECTION. **Section 3. Standard of care -- requirements for action for damages.** (1) A health carrier or managed care entity for a health benefit plan must exercise ordinary care when making health care treatment decisions that affect the diagnosis, care, or treatment of an insured or enrollee.

(2) A health carrier or managed care entity for a health benefit plan is liable for damages for harm to an insured or enrollee proximately caused by failure to exercise ordinary care in the health care treatment decisions made by an employee, agent, or representative of the carrier or entity who is acting on behalf of that carrier or entity and over whom the carrier or entity exercises influence or control.

(3) A cause of action may not be brought against a health carrier or managed care entity pursuant to this section unless the insured or enrollee, or the representative of the insured or enrollee, has:

(a) exhausted any appeal or review process of the health carrier or managed care entity;

(b) mailed or delivered written notice of the claim that is the basis for the action to the health carrier or managed care entity no later than 30 days before the action is filed; ~~and~~

(c) agreed to submit the claim that is the basis for the action to review by a peer; AND

(D) SUBMITTED THE CLAIM TO THE MONTANA MEDICAL LEGAL PANEL UNDER TITLE 27, CHAPTER 6.

(4) If an action is brought against a health carrier or managed care entity pursuant to this section and the plaintiff has not complied with the requirements of subsection (3), the court may order the parties to submit the claim to review by a peer.

(5) If the insured or enrollee, or the insured's or enrollee's representative, seeks to exhaust the appeals and review process or provides notice, as required by subsection (3), before the applicable statute of limitations has expired, the limitations period is tolled until the later of:

(a) the 30th day after the date the insured or enrollee, or the insured's or enrollee's representative, has exhausted the process for appeal or review; or

(b) the 40th day after the date the written notice required by subsection (3)(b) is mailed or delivered.

NEW SECTION. **Section 4. Codification instruction.** [Section ~~2~~ 3] is intended to be codified as an integral part of Title 33, chapter 37, and the provisions of Title 33, chapter 37, apply to [section ~~2~~ 3].

NEW SECTION. **Section 5. Applicability.** [This act] applies to causes of action arising after October 1, 2001.

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